

1-1 By: Ellis S.B. No. 1680  
1-2 (In the Senate - Filed March 11, 2011; March 23, 2011, read  
1-3 first time and referred to Committee on Criminal Justice;  
1-4 April 12, 2011, reported adversely, with favorable Committee  
1-5 Substitute by the following vote: Yeas 7, Nays 0; April 12, 2011,  
1-6 sent to printer.)

1-7 COMMITTEE SUBSTITUTE FOR S.B. No. 1680 By: Ellis

1-8 A BILL TO BE ENTITLED  
1-9 AN ACT

1-10 relating to certain evidence in a prosecution of fraud or theft  
1-11 involving Medicaid or Medicare benefits and to certain criminal  
1-12 procedures involving offenses in general.

1-13 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-14 SECTION 1. Chapter 38, Code of Criminal Procedure, is  
1-15 amended by adding Article 38.46 to read as follows:

1-16 Art. 38.46. EVIDENCE IN AGGREGATION PROSECUTION FOR FRAUD  
1-17 OR THEFT COMMITTED WITH RESPECT TO NUMEROUS MEDICAID OR MEDICARE  
1-18 RECIPIENTS. In trials involving an allegation of a continuing  
1-19 scheme of fraud or theft that involves Medicaid or Medicare  
1-20 benefits and is alleged to have been committed with respect to a  
1-21 large class of Medicaid or Medicare recipients in an aggregate  
1-22 amount or value, the attorney representing the state is not  
1-23 required to prove by direct evidence that each Medicaid or Medicare  
1-24 recipient did not consent or effectively consent to a transaction  
1-25 in question. It is sufficient if the lack of consent or effective  
1-26 consent to a particular transaction or transactions is proven by  
1-27 either direct or circumstantial evidence.

1-28 SECTION 2. Article 39.01, Code of Criminal Procedure, is  
1-29 amended to read as follows:

1-30 Art. 39.01. IN EXAMINING TRIAL. When an examination takes  
1-31 place in a criminal action before a magistrate, the state [~~State~~] or  
1-32 the defendant may have the deposition of any witness taken by any  
1-33 officer authorized by this chapter. The state [~~State~~] or the  
1-34 defendant may not use the deposition for any purpose unless that  
1-35 party first acknowledges that the entire evidence or statement of  
1-36 the witness may be used for or against the defendant on the trial of  
1-37 the case, subject to all legal objections. The deposition of a  
1-38 witness duly taken before an examining trial or a jury of inquest  
1-39 and reduced to writing or recorded and then certified according to  
1-40 law, provided that [~~where~~] the defendant and the defendant's  
1-41 attorney were [~~was~~] present when that testimony was taken [~~7~~] and  
1-42 that the defendant had the privilege afforded of cross-examining  
1-43 the witness, or taken at any prior trial of the defendant for the  
1-44 same offense, may be used by either the state [~~State~~] or the  
1-45 defendant in the trial of the defendant's criminal case under the  
1-46 following circumstances:

1-47 When oath is made by the party using the deposition that the  
1-48 witness resides outside the state [~~State~~]; or that since the  
1-49 witness's testimony was taken, the witness has died, or has removed  
1-50 beyond the limits of the state [~~State~~], or has been prevented from  
1-51 attending the court through the act or agency of the other party, or  
1-52 by the act or agency of any person whose object was to deprive the  
1-53 state [~~State~~] or the defendant of the benefit of the testimony; or  
1-54 that by reason of age or bodily infirmity, that witness cannot  
1-55 attend; or that the witness is a Medicaid or Medicare recipient or a  
1-56 caregiver or guardian of the recipient, and the recipient's  
1-57 Medicaid or Medicare account was charged for a product or service  
1-58 that was not provided or rendered to the recipient. When the  
1-59 testimony is sought to be used by the state [~~State~~], the oath may be  
1-60 made by any credible person. When sought to be used by the  
1-61 defendant, the oath must be made by the defendant in person.

1-62 SECTION 3. Chapter 39, Code of Criminal Procedure, is  
1-63 amended by adding Article 39.026 to read as follows:

2-1 Art. 39.026. DEPOSITIONS OF MEDICAID OR MEDICARE RECIPIENTS  
2-2 OR CAREGIVERS. (a) In this article:  
2-3 (1) "Caregiver" means a person, including a guardian,  
2-4 who is authorized by law, contract, or familial relationship to  
2-5 care for a recipient.  
2-6 (2) "Medicaid" means the state Medicaid program.  
2-7 (3) "Medicaid recipient" has the meaning assigned by  
2-8 Section 36.001, Human Resources Code.  
2-9 (4) "Medicare" means the federal health insurance  
2-10 program that is operated under the Health Insurance for the Aged Act  
2-11 (42 U.S.C. Section 1395 et seq.).  
2-12 (5) "Medicare recipient" means an individual on whose  
2-13 behalf a person claims or receives a payment under Medicare,  
2-14 without regard to whether the individual was eligible for benefits  
2-15 under Medicare.  
2-16 (6) "Recipient" means a Medicaid recipient or a  
2-17 Medicare recipient.  
2-18 (b) The court may order the attorney representing the state  
2-19 to take the deposition of a recipient or caregiver who is the  
2-20 alleged victim of or witness to an offense constituting fraud or  
2-21 theft that involves Medicaid or Medicare benefits. Any order under  
2-22 this subsection must be issued not later than the 180th day after  
2-23 the date on which the state files an application to take the  
2-24 deposition under Article 39.02.  
2-25 (c) On the motion of either party, the court may order the  
2-26 attorney representing the state to take the deposition of a  
2-27 recipient or caregiver by video recording. The person operating  
2-28 the video recording device must be available to testify regarding  
2-29 the authenticity of the video recording and the taking of the  
2-30 deposition in order for the video recording to be admissible.  
2-31 (d) If the court finds that the video recording of the  
2-32 deposition is properly authenticated and that requiring the jury to  
2-33 view the entire recording would unnecessarily prolong the trial,  
2-34 the court may allow a party to offer the entire video recording into  
2-35 evidence without requiring the jury to view the entire video  
2-36 recording during the trial. This subsection does not preclude the  
2-37 attorney representing the state, the defendant, or the defendant's  
2-38 attorney from offering into evidence and playing for the jury a  
2-39 portion of a video-recorded deposition.  
2-40 (e) The attorney representing the state and the defendant or  
2-41 the defendant's attorney, by written agreement filed with the  
2-42 court, may extend the deadline for the taking of the deposition.  
2-43 (f) The court shall grant any request by the attorney  
2-44 representing the state to extend the deadline for the taking of the  
2-45 deposition if a reason for the request is the unavailability,  
2-46 health, or well-being of the recipient or caregiver.  
2-47 (g) The Texas Rules of Civil Procedure govern the taking of  
2-48 the deposition, except that, to the extent of any conflict with this  
2-49 code or applicable court rules adopted for criminal proceedings,  
2-50 this code and the rules for criminal proceedings govern. The  
2-51 attorney representing the state and the defendant or the  
2-52 defendant's attorney may agree to modify the rules applicable to  
2-53 the deposition by written agreement filed with the court before the  
2-54 taking of the deposition.  
2-55 (h) If a defendant is unavailable to attend a deposition  
2-56 because the defendant is confined in a correctional facility, the  
2-57 court shall issue any orders or warrants necessary to secure the  
2-58 defendant's presence at the deposition. The sheriff of the county  
2-59 in which a deposition is to be taken under this subsection shall  
2-60 provide a secure location for the taking of the deposition and  
2-61 sufficient law enforcement personnel to ensure that the deposition  
2-62 is taken safely. The state's application to take a deposition or  
2-63 notice of deposition is not required to include the identity of any  
2-64 law enforcement agent the sheriff assigns to the deposition under  
2-65 this subsection, and the defendant may not object to the taking of  
2-66 the deposition based solely on the state's omission of the identity  
2-67 of that agent.  
2-68 (i) If a defendant is unavailable to attend a deposition for  
2-69 any reason other than confinement in a correctional facility, the

3-1 defendant or the defendant's attorney shall request a continuance  
3-2 from the court. The court may grant the continuance if the  
3-3 defendant or the defendant's attorney demonstrates good cause for  
3-4 the continuance and that the request is not brought for the purpose  
3-5 of delay or avoidance. A defendant's failure to attend a deposition  
3-6 or request a continuance in accordance with this subsection  
3-7 constitutes a waiver of the defendant's right to be present at the  
3-8 deposition.

3-9 SECTION 4. Article 39.12, Code of Criminal Procedure, is  
3-10 amended to read as follows:

3-11 Art. 39.12. PREDICATE TO READ. Depositions taken in  
3-12 criminal actions shall not be read unless oath be made that the  
3-13 witness resides out of the state [State]; or that since the [his]  
3-14 deposition was taken, the witness has died; or that the witness [he]  
3-15 has removed beyond the limits of the state [State]; or that the  
3-16 witness [he] has been prevented from attending the court through  
3-17 the act or agency of the defendant; or by the act or agency of any  
3-18 person whose object was to deprive the state or the defendant of the  
3-19 benefit of the testimony; or that by reason of age or bodily  
3-20 infirmity, the [such] witness cannot attend; or that the witness is  
3-21 a Medicaid or Medicare recipient or a caregiver or guardian of the  
3-22 recipient, and the recipient's Medicaid or Medicare account was  
3-23 charged for a product or service that was not provided or rendered  
3-24 to the recipient. When the deposition is sought to be used by the  
3-25 state [State], the oath may be made by any credible person. When  
3-26 sought to be used by the defendant, the oath shall be made by the  
3-27 defendant [him] in person.

3-28 SECTION 5. The change in law made by this Act applies to a  
3-29 criminal proceeding that commences on or after the effective date  
3-30 of this Act. A criminal proceeding that commences before the  
3-31 effective date of this Act is covered by the law in effect when the  
3-32 proceeding commenced, and the former law is continued in effect for  
3-33 that purpose.

3-34 SECTION 6. This Act takes effect September 1, 2011.

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